

September 8, 2010

VIA ELECTRONIC SUBMISSION

Jessica Finkel
U.S. Department of Education
1990 K Street, NW, Room 8031
Washington, DC 20006-8502

RE: The Office of Postsecondary Education's Notice of Proposed Rulemaking on "Program Integrity: Gainful Employment," Docket ID ED-2010-OPE-0012, 75 Fed. Reg. 43616 (July 26, 2010)

Dear Ms. Finkel:

The Office of Advocacy (Advocacy) of the U.S. Small Business Administration submits these comments to the Department of Education's Office of Postsecondary Education regarding its Notice of Proposed Rulemaking (NPRM), which would establish measures for determining whether certain postsecondary educational programs lead to "gainful employment" in recognized occupations, and the conditions under which these educational programs remain eligible for the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended (HEA).

Advocacy recognizes the importance of the dual goals of protecting students from extreme debt and protecting taxpayers from the negative consequences of default.¹ However, Advocacy is concerned about the economic impact this proposal may have on small institutions as the agency pursues its goals. Advocacy has been contacted by small institutions and their representatives who have expressed concerns regarding this proposal.² Advocacy urges the agency to take these concerns into consideration as it proceeds.

The Office of Advocacy

The Office of Advocacy, created in 1976, monitors and reports on agency compliance with the Regulatory Flexibility Act of 1980 (RFA), as amended by the Small

¹ 75 Fed. Reg. 43616 (July 26, 2010).

² The Office of Advocacy was contacted by representatives from the Career Colleges Association, the American Association of Cosmetology Schools, the HEAL (Higher Education Allied Health Leaders) Coalition and others regarding the impact of this proposal on their small institutions members.

Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).³ Because it is an independent office within the SBA, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The RFA requires federal agencies to determine a rule's economic impact on small entities and consider significant regulatory alternatives that achieve the agency's objectives while minimizing the impact on small entities. The RFA's definition of small entity includes small businesses, which includes small for-profit schools (defined by SBA as those with annual revenues less than \$7,000,000),⁴ and small organizations, defined as "any not-for-profit enterprise which is independently owned and operated and not dominant in its field," including private not-for-profit institutions.

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.⁵ The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to Advocacy's written comments on the proposed rule, unless the agency certifies that the public interest is not served by doing so.

Small Entity Concerns with the NPRM

Advocacy commends the Department of Education for including an initial regulatory flexibility analysis (IRFA)⁶ in this proposal, as well as making available to the public much of the information that provided the basis for that analysis. After reviewing the IRFA and discussing the proposal with small institutions, Advocacy would like to relay the following small business concerns with the NPRM, as well as provide a number of proposed alternatives for the agency's consideration. As the agency has

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980), (codified as amended at 5 U.S.C. §§ 601-612).

⁴ The U.S. Small Business Administration has established numerical definitions, or "size standards," for all for-profit industries. Size standards represent the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business concern. For-profit schools are considered "small businesses" if the institution's annual revenue is less than \$7,000,000. For more information, please see <http://www.sba.gov/contractingopportunities/officials/size/index.html>.

⁵ E.O. 13272, at § 2(c).

⁶ Under section 603(b) of the Regulatory Flexibility Act, an IRFA must describe the impact of the proposed rule on small entities and contain the following information: 1) a description of the reasons why the action by the agency is being considered, 2) a succinct statement of the objectives of, and legal basis for, the proposed rule, 3) a description- and, where feasible, an estimate of the number- of small entities to which the proposed rule will apply, 4) a description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the types of professional skills necessary for preparation of the report or record, and 5) an identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule. Section 603(c) requires an agency to include a description of any significant alternatives to the proposed rule that minimize significant economic impacts on small entities while accomplishing the agency's objectives. For more information, please see the Office of Advocacy's "A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act," at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

acknowledged, some of the analysis of this rule's impact on small entities is uncertain.⁷ In light of this fact, Advocacy urges the agency to consider the following:

1. Small entities are concerned that the agency's economic analysis did not adequately capture the potential impact on small institutions

The agency has noted that many of the programs subject to the regulation are offered by institutions that would qualify as small entities⁸ (as noted above these small institutions include for profit schools with annual revenue under \$7,000,000 and other occupationally-specific training at other institutions). However, Advocacy is concerned that the IRFA failed to fully address the disproportionate impact on this sector.

In part, Advocacy is concerned that the agency was unable to produce more program-specific data with regard to small institutions. Advocacy is concerned that many small institutions who only offer a few programs would be much more vulnerable to the proposed changes. Small entities may not have the resources that would allow them to recoup losses in one ineligible program by focusing on gaining revenue in another.

For example, Advocacy has learned that according to the American Association of Cosmetology Schools, the average number of programs offered by their members is believed to be 1.5. While the agency acknowledges that a "significant component" of cosmetology programs have only one program, these institutions, most of which are small institutions, were excluded from the analysis.⁹ Advocacy urges the agency to further assess the impact on small entities, and provide more program-specific information.

2. Small entities are concerned about the proposed metrics used to define "gainful employment"

Small entities have expressed concerns regarding the agency's decision to use set limits as the primary tool to determine whether an agency is preparing its students for gainful employment as well as the complexity of these metrics. Small entities are also concerned about whether the proposed metrics alone provide an accurate measure of gainful employment. Advocacy urges the agency to consider the following small entity concerns regarding the proposed metrics and work with the industry as this rule proceeds to ensure that any limits included are appropriate. Advocacy has also noted additional

⁷ For example, the agency did not offer a count of the number of programs offered by institutions, but rather provided a rough estimate, and requested comments on the accuracy of that information. This is important because the proposed regulations determine eligibility for each individual program, not institutions as a whole. An institution may have programs that remain eligible and some that become ineligible after implementation. 75 Fed. Reg. 43696.

⁸ *Id.*

⁹ 75 Fed. Reg. 43668-43669. The agency utilized information from the Missouri Department of Higher Education as the basis for analysis for this rule's regulatory impact analysis. However, as the agency notes, there were some limits due to lack of data availability, including the exclusion of cosmetology schools in the analysis.

considerations that may be used by the agency to determine if an institution is preparing its students for gainful employment.

The agency has proposed the utilization of limits related to repayment rates and debt to income ratios to determine whether an institution is preparing its students for gainful employment. With regard to the repayment rate, small entities have expressed concern about the lack of flexibility and confusion that may stem from these proposed limits, since some repayment options available to students will not be acceptable for the purposes of passing the repayment test proposed in this rule. For example, students electing to defer or forbear their loans are not considered to be in repayment for purposes of this rule. In addition, the repayment rate is based upon a 10-year repayment plan, when students may have the option to elect an extended repayment plan.

Small entities have also expressed concern regarding the debt to income ratio, specifically the use of an average to determine the income for an institution in the calculation of the ratio.¹⁰ This ratio could fluctuate greatly year to year with the impact of just a few students. Small entities have specifically noted concerns regarding programs with fewer students, noting that limited enrollment may make them particularly vulnerable to changes in the ratio, and will make it particularly difficult for those institutions to assess future compliance. Small entities have also requested additional information regarding the impact on programs when debt to income information is not available.

While a number of small entities have expressed concerns about the use of a strict test with additional stipulations as well as the complexity of the test, small entities have also suggested that these set limits should not serve as the principal indicator of an institution's success in preparing a student for gainful employment. While the metrics used may be a useful indicator of an institution's success, small entities argue that these metrics should not be the sole consideration when deciding whether an institution prepares its students for gainful employment.

Small institutions have noted the following factors that could be used to determine whether an institution is fulfilling its requirement of preparing students for gainful employment. The agency has addressed a couple of these recommendations briefly, but Advocacy requests that the agency provide a more thorough analysis of the feasibility of these options.

- a. Certification/Licensure: Many small institution graduates are already subject to state and/or professional licensure and certification. Small entities have suggested that Education consider including an institution's licensure/certification rate as an alternative method for determining whether a program is meeting the gainful employment requirement. Small entities argue that there is a direct link between their program's

¹⁰ The debt levels for the debt to income ratio are calculated using the median of the students' statistics, while the income levels are calculated using the average. "Frequently Asked Questions: Program Integrity: Gainful Employment Notice of Proposed Rulemaking," available at: <http://www2.ed.gov/policy/highered/reg/hearulemaking/2009/ge-faq.pdf>.

ability to adequately prepare students for gainful employment and the student's ability to pass the exams necessary to gain a license or certificate in a particular area.

- b. Employer Verifications: In addition, small entities have suggested utilizing employer verifications to a larger extent as a tool to determine whether an institution is preparing its students for gainful employment. This involves obtaining assessments from local employers regarding their analysis of the program's curriculum and student assessments. Small entities argue that these verifications offer strong support of the marketability of a student's skills, which promotes additional gainful employment opportunities.
 - c. Disclosures: Small entities are supportive of providing students with the information necessary to make an informed decision regarding their future studies. Ensuring that institutions disclose the appropriate information regarding financial aid and potential job prospects is central to the pursuit of the agency's goal of protecting students from unmanageable debt.
3. If the rule is implemented as proposed, small entities are concerned about their ability to assess their compliance and identify methods to remedy

Small institutions have expressed concern that even if they are inclined to proactively address possible issues with compliance, that they will be unable to access the information needed to fully assess whether they will pass the repayment and debt/income tests. The agency states that since the regulations will not go into effect until July 1, 2012, this will provide institutions with an opportunity to assess their programs and "take steps to mitigate the number of programs negatively affected."¹¹ However, Advocacy notes that with few resources and limited access to some of the financial information required to fully assess the implications of this rule, it may be very difficult for many small institutions to adequately assess and prepare for this rule's implementation by July 1, 2012. Small institutions request additional information from the agency on steps they can take to access this information and determine their projected compliance with the rule.

Additional Alternatives to Reduce the Potential Impact on Small Entities

Section 603(c) of the RFA¹² requires agency's to include in their IRFA a description of any significant alternatives to the proposed rule that minimize significant economic impacts on small entities while accomplishing the agency's objectives. While the agency did note a few alternatives in the IRFA analysis, Advocacy recommends that the agency thoroughly consider the additional alternatives below.

¹¹ 75 Fed. Reg. 43660.

¹² 5 U.S.C. § 603(c).

1. Small Institution Exemption:

Much of the impetus for the rule springs from the negative admissions practices and other faults by some for-profit schools. As the Secretary has noted, many of the problems discussed recently regarding the for-profit industry “afflict only a small minority of vocational and career programs.”¹³ The discussion has focused primarily on the for-profit institutions with the largest amount of revenue, while smaller schools have not been identified as a large part of the problem. While these issues regarding fraudulent practices and failing programs certainly need to be addressed to ensure that students and taxpayers alike are protected, Advocacy urges the agency to consider the numerous small institutions in this sector that will be significantly impacted by this proposal.

The Secretary has stated that the Department of Education “will take all measures necessary to ensure that a new rule does not have significant negative unintended consequences.”¹⁴ However, many in the small institution community are very concerned that this rule will in fact have significant unintended consequences on their sector. In order to avoid these significant unintended consequences, Advocacy recommends that the agency consider exempting small institutions from the requirements of this rule. As described above, small entities fear that the impact of this proposal could be much greater on them versus their larger institution counterparts. Advocacy urges the agency to consider this impact and ensure that this important sector is not unintentionally burdened.

2. Additional Compliance Time:

While Advocacy urges the agency to consider exempting these smaller institutions from the rule requirements, as an alternative, Advocacy recommends that the agency consider providing the smaller institutions with additional time in order to comply with the rule’s requirements. As stated above, small institutions have expressed concern over the complexity of the rule’s metrics, over the lack of information available to allow entities to assess their own compliance, as well as their ability to effectuate changes in their school’s compliance. Small institutions may not have the resources immediately available to devote staff time to quickly deciphering their compliance with the rule and creating strategic plans to become compliant.

Advocacy urges the agency to consider extending the compliance time for small entities and, as recommended above, provide them with additional guidance on ways to access available information, determine compliance, and mitigate the number of programs that would be negatively impacted.

¹³ “Debate: We Only Want to Make Sure Schools Deliver Results,” *AOL News Op-Ed*, April 21, 2010, available at <http://www.ed.gov/blog/2010/04/aol-news-op-ed-debate-we-only-want-to-make-sure-schools-deliver-results/>.

¹⁴ *Id.*

Conclusion

As the Secretary has stated, there is an important role for the for-profit schools to play in training our workforce and preparing our students to be globally competitive. Many of these proprietary schools and other institutions offering certificate-granting programs provide the flexibility that many nontraditional students require in order to reach their educational goals. Small institutions in particular can tailor their services to respond to an employers' demands in their community and offer flexibility.

However, as noted earlier, many of these smaller institutions remain more vulnerable to the impacts of this proposal than some of the larger institutions. Advocacy urges the agency to thoroughly assess the impact this proposal will have on many small institutions as it works toward its important goals of protecting students from unmanageable debt and protecting the taxpayers' investment.

The Office of Advocacy appreciates the opportunity to comment on this rulemaking and welcomes the opportunity to assist the agency in the future as it considers the impact of this proposal. Should you have any questions or require additional information, please contact me or Kate Reichert of my staff at (202) 205-6972.

Sincerely,

/s/

Winslow Sargeant, Ph.D.
Chief Counsel for Advocacy

/s/

Kate Reichert
Assistant Chief Counsel

cc: The Honorable Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget